

THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

DAVID BORDEN, individually, and on  
behalf of all others similarly situated,

Plaintiff,

v.

EFINANCIAL, LLC, a Washington  
Limited Liability Company,

Defendant.

**No. 2:19-cv-01430-JLR**

**DEFENDANT'S ANSWER AND  
AFFIRMATIVE DEFENSES TO CLASS  
ACTION COMPLAINT FOR  
VIOLATION OF THE TELEPHONE  
CONSUMER PROTECTION ACT, 47  
U.S.C. § 227**

**DEMAND FOR JURY TRIAL**

1 Defendant, eFinancial, LLC (“eFinancial”), for its answer and affirmative defenses to the  
2 Complaint states as follows. eFinancial reserves the right to amend this Answer based on  
3 information made available through discovery or further investigation. Unless specifically  
4 admitted below, eFinancial denies each and every allegation, claim and prayer for relief  
5 contained in the Complaint.  
6

### 7 **I. PARTIES**

8  
9 1. eFinancial lacks knowledge or information sufficient to form a belief as to the truth  
10 of the allegations in Paragraph 1 and on that ground denies the allegations in Paragraph 1.

11 2. Admitted.

### 12 **II. JURISDICTION AND VENUE**

13 3. The allegations in Paragraph 3 state legal conclusions to which no response is  
14 required. To the extent that a response is required, eFinancial denies the allegations in Paragraph  
15 3.

16 4. eFinancial admits that it is a Washington Limited Liability company with its  
17 principal business located in the Western District of Washington. The remaining allegations in  
18 Paragraph 4 state legal conclusions to which no response is required. To the extent that a response  
19 is required, eFinancial denies the remaining allegations in Paragraph 4.

### 20 **III. PRELIMINARY STATEMENT**

21 5. The allegations in Paragraph 5 state legal conclusions to which no response is  
22 required. To the extent that a response is required, eFinancial denies the allegations in Paragraph  
23 5.

24 6. eFinancial admits that this is a class action lawsuit alleging violations under the  
25 Telephone Consumer Protection Act. The remaining allegations in Paragraph 6 state legal  
26 conclusions to which no response is required. To the extent that a response is required, eFinancial  
27 denies the allegations in Paragraph 6. To the extent that Paragraph 6 contains any factual

1 allegations, eFinancial denies those allegations. Further, eFinancial denies that any class exists,  
2 denies that Plaintiff can maintain this action as a class action, denies that the class as alleged can  
3 be certified, and denies all remaining allegations of Paragraph 6.

4 7. eFinancial admits that Plaintiff sued eFinancial individually and on behalf of all  
5 others similarly situated alleging violations under the Telephone Consumer Protection Act. The  
6 remaining allegations in Paragraph 7 state legal conclusions to which no response is required. To  
7 the extent that a response is required, eFinancial denies the allegations in Paragraph 7. To the  
8 extent that Paragraph 7 contains any factual allegations, eFinancial denies those allegations.  
9 Further, eFinancial denies that any class exists, denies that Plaintiff can maintain this action as a  
10 class action, denies that the class as alleged can be certified, and denies all remaining allegations  
11 of Paragraph 7.

#### 12 IV. GENERAL ALLEGATIONS

13 8. eFinancial admits that Plaintiff was sent these text messages pursuant to the prior  
14 express written consent he provided in his application process on the Progressive website.  
15 eFinancial lacks knowledge or information sufficient to form a belief as to the truth of the  
16 remaining allegations in Paragraph 8 and on that ground denies the allegations in Paragraph 8.

17 9. eFinancial admits that the text messages were sent from the short code 95578 but  
18 denies the remaining allegations in Paragraph 9.

19 10. The allegations in Paragraph 10 state legal conclusions to which no response is  
20 required. To the extent that a response is required, eFinancial denies the allegations in Paragraph  
21 10. To the extent that Paragraph 10 contains any factual allegations, eFinancial denies those  
22 allegations.  
23  
24  
25  
26

1           11. The allegations in Paragraph 11 state legal conclusions to which no response is  
2 required. To the extent that a response is required, eFinancial denies the allegations in Paragraph  
3 11. To the extent that Paragraph 11 contains any factual allegations, eFinancial denies those  
4 allegations.

5           12. The allegations in Paragraph 12 state legal conclusions to which no response is  
6 required. To the extent that a response is required, eFinancial denies the allegations in Paragraph  
7 12. To the extent that Paragraph 12 contains any factual allegations, eFinancial denies those  
8 allegations.

9           13. The allegations in Paragraph 13 state legal conclusions to which no response is  
10 required. To the extent that a response is required, eFinancial denies the allegations in Paragraph  
11 13.

12           14. Denied.

13           15. eFinancial admits that the text messages set forth in Paragraph 8 were sent to  
14 Plaintiff who had provided prior express written consent and denies the remaining allegations in  
15 Paragraph 15.

16           16. The allegations in Paragraph 16 state legal conclusions to which no response is  
17 required. To the extent that a response is required, eFinancial denies the allegations in Paragraph  
18 16.

19           17. eFinancial admits that the text messages set forth in Paragraph 8 were sent to  
20 Plaintiff who had provided prior express written consent and denies the remaining allegations in  
21 Paragraph 17.

22           18. The allegations in Paragraph 18 state legal conclusions to which no response is  
23 required. To the extent that a response is required, eFinancial denies the allegations in Paragraph  
24 18. To the extent that Paragraph 18 contains any factual allegations, eFinancial denies those  
25 allegations.  
26

1           19.     eFinancial lacks knowledge or information sufficient to form a belief as to the truth  
2 of the allegations in Paragraph 19 and on that ground denies the allegations in Paragraph 19.

3           20.     eFinancial lacks knowledge or information sufficient to form a belief as to the truth  
4 of the allegations in Paragraph 20 and on that ground denies the allegations in Paragraph 20.

5                               **V.     CLASS ACTION ALLEGATIONS**

6           21.     eFinancial admits that Plaintiff brings this action as a class action but denies that  
7 any class exists, denies that Plaintiff can maintain this action as a class action, denies that the class  
8 as alleged can be certified, and denies all remaining allegations of Paragraph 21.

9           22.     eFinancial admits that Plaintiff brings this action as a class action but denies that  
10 any class exists, denies that Plaintiff can maintain this action as a class action, denies that the class  
11 as alleged can be certified, and denies all remaining allegations of Paragraph 22.

12           23.     eFinancial denies that any class exists, denies that Plaintiff can maintain this action  
13 as a class action, denies that the class as alleged can be certified, and denies all remaining  
14 allegations of Paragraph 23.

15           24.     Paragraph 24 states legal conclusions to which no response is required. To the  
16 extent that a response is required, eFinancial denies that any class exists, denies that Plaintiff can  
17 maintain this action as a class action, denies that the class as alleged can be certified, and denies  
18 all remaining allegations of Paragraph 24.

19           25.     Paragraph 25 states legal conclusions to which no response is required. To the  
20 extent that a response is required, eFinancial denies that any class exists, denies that Plaintiff can  
21 maintain this action as a class action, denies that the class as alleged can be certified, and denies  
22 all remaining allegations of Paragraph 25. Further, to the extent Paragraph 26 contains factual  
23 allegations, eFinancial lacks knowledge or information sufficient to form a belief as to the truth of  
24 the allegations in Paragraph 25 and on that ground denies the allegations in Paragraph 25.

26. Paragraph 26 states legal conclusions to which no response is required. To the extent that a response is required, eFinancial denies that any class exists, denies that Plaintiff can maintain this action as a class action, denies that the class as alleged can be certified, and denies all remaining allegations of Paragraph 26. Further, to the extent Paragraph 26 contains factual allegations, eFinancial lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 26 and on that ground denies the allegations in Paragraph 26.

27. eFinancial lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 27 and on that ground denies the allegations in Paragraph 27. eFinancial also denies that any class exists, denies that Plaintiff can maintain this action as a class action, denies that the class as alleged can be certified, and denies all remaining allegations of Paragraph 27.

28. Paragraph 28 states legal conclusions to which no response is required. To the extent that a response is required, eFinancial denies that any class exists, denies that Plaintiff can maintain this action as a class action, denies that the class as alleged can be certified, and denies all remaining allegations of Paragraph 28. Further, to the extent that Paragraph 28 contains any factual allegations, eFinancial denies those allegations.

## **VI. CAUSES OF ACTION**

### **Claim for Relief for Violations of the TCPA**

29. eFinancial reasserts and incorporates herein by references its responses to the averments set forth in Paragraphs 1 through 28 above as if fully set forth herein.

30. eFinancial admits that Plaintiff brings this action against the Defendant for sending eFinancial Insurance Text Messages to Plaintiff and to members of the Plaintiff Class and denies that any class exists, denies that Plaintiff can maintain this action as a class action, denies that the class as alleged can be certified, and denies all remaining allegations of Paragraph 30.

31. Denied.

32. Denied.

33. Denied.

34. Denied.

## **VII. PRAYER FOR RELIEF**

eFinancial denies that Plaintiff is entitled to any of the relief requested.

### **AFFIRMATIVE DEFENSES**

eFinancial sets forth the following affirmative defenses. By setting forth these defenses, eFinancial does not assume the burden of proof as to any fact issue or other element of any cause of action that properly belongs to Plaintiff. Further, eFinancial reserves the right to amend or supplement its affirmative defenses as discovery or further investigation may justify.

#### **FIRST AFFIRMATIVE DEFENSE**

##### **(Failure to State a Claim)**

The Complaint fails to state a claim upon which relief can be granted.

#### **SECOND AFFIRMATIVE DEFENSE**

##### **(Prior Express Consent)**

Plaintiff and any putative class members of the purported class provided prior express consent to receive the alleged text messages.

#### **THIRD AFFIRMATIVE DEFENSE**

##### **(No ATDS was Used)**

The text messages allegedly sent to Plaintiff and any putative class members of the purported class were not made using an automatic telephone dialing system.

**FOURTH AFFIRMATIVE DEFENSE**

**(No Vicarious Liability)**

eFinancial is not liable for any alleged calls made by third parties for whose actions eFinancial cannot be held vicariously liable.

**FIFTH AFFIRMATIVE DEFENSE**

**(Ratification and Acquiescence)**

The claims of Plaintiff and any putative members of the purported class are barred, in whole or in part, by the doctrine of ratification and because Plaintiff and/or any purported class members acquiesced to any conduct engaged in by eFinancial, its agents and/or its partners.

**SIXTH AFFIRMATIVE DEFENSE**

**(Waiver)**

The claims of Plaintiff and any putative members of the purported class are barred by the doctrine of waiver.

**SEVENTH AFFIRMATIVE DEFENSE**

**(Estoppel)**

The claims of Plaintiff and any putative members of the purported classes are barred, in whole or in part, by their own conduct, actions, and inactions, which amount to and constitute an estoppel of all claims and relief sought.

**EIGHTH AFFIRMATIVE DEFENSE**

**(Unclean Hands)**

The claims of Plaintiff and any putative members of the purported classes are barred, in whole or in part, by the doctrine of unclean hands.



**NINTH AFFIRMATIVE DEFENSE**

**(Plaintiff has no Standing)**

Plaintiff's claims, and those claims Plaintiff purports to bring on behalf of members of the putative class are barred, in whole or in part, because Plaintiff and the putative class members lack standing to assert those claims.

**TENTH AFFIRMATIVE DEFENSE**

**(Failure to Mitigate)**

Plaintiff's claims are barred, in whole or in part, by Plaintiff's failure to mitigate damages, if any. Similarly, members of the putative class that Plaintiff seeks to represent failed to mitigate their claimed damages, if any.

**ELEVENTH AFFIRMATIVE DEFENSE**

**(Statute is Unconstitutional)**

The TCPA violates the First Amendment, Fifth Amendment, Eighth Amendment and Fourteenth Amendment to the Constitution of the United States of America and is unconstitutional under State Law.

**TWELFTH AFFIRMATIVE DEFENSE**

**(Due Process)**

Certification of a class, based upon the facts and circumstances of this case, would constitute a denial of Defendant's right to due process under the Fourteenth Amendment to the United States Constitution and under State law.

**THIRTEENTH AFFIRMATIVE DEFENSE**

**(Good Faith)**

The claims of Plaintiff and any putative members of the purported classes are barred, in whole or in part, by eFinancial's good faith and/or good faith legal defense.

**PRAYER FOR RELIEF**

WHEREFORE, eFinancial prays for judgment as follows:

1. That Plaintiff takes nothing by this action;
2. That judgment be entered in favor of eFinancial and against Plaintiff;
3. That eFinancial be awarded its costs of suit;
4. The Court deny Plaintiff's request to certify this action as a class action; and
5. That the Court award eFinancial such other and further relief as the Court may deem proper.

DATED: December 5, 2019

By: s/ Nicola C. Menaldo  
Nicola C. Menaldo #44459  
Attorney for Defendant eFinancial, LLC  
**Perkins Coie LLP**  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Telephone: 206.359.8000  
Facsimile: 206.359.9000  
Email: [NMenaldo@perkinscoie.com](mailto:NMenaldo@perkinscoie.com)

By: s/ James G. Snell  
James G. Snell (*pro hac vice*)  
Attorney for Defendant eFinancial, LLC  
**Perkins Coie LLP**  
3150 Porter Drive  
Palo Alto, CA 94304-1212  
Telephone: 650.838-4300  
Facsimile: 650.838.4350  
Email: [JSnell@perkinscoie.com](mailto:JSnell@perkinscoie.com)

By: s/ Debra Bernard  
Debra R. Bernard (*pro hac vice*)  
Attorney for Defendant eFinancial, LLC  
**Perkins Coie LLP**  
131 South Dearborn Street, Suite 1700  
Chicago, IL 60603-5559  
Telephone: 312.324.3400  
Facsimile: 312.324.9400  
Email: [DBernard@perkinscoie.com](mailto:DBernard@perkinscoie.com)